

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONNA D. ESHGHI)	
Claimant)	
VS.)	
)	Docket No. 204,376
RIVERSIDE HOSPITAL)	
Respondent)	
AND)	
)	
PHICO INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Order dated April 3, 1997, entered by Administrative Law Judge Jon L. Frobish.

ISSUES

The Administrative Law Judge awarded claimant \$200 in late penalties under K.S.A. 44-512a for respondent's and the insurance carrier's failure to make timely payment of temporary total disability benefits. Respondent and its insurance carrier requested the Appeals Board to review the following issue:

Whether the Administrative Law Judge exceeded his statutory authority in assessing penalties for late payment of temporary total disability to Phico Insurance Companies pursuant to K.S.A. 44-512a(b) and K.S.A. 44-551 when Claimant's temporary total disability benefits were voluntarily reinstated according to the time, place and manner that Claimant was being paid while working?

Claimant raised the issue of Appeals Board jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reason below, the Order should be reversed and set aside.

Claimant's request for penalties is a proceeding under K.S.A. 44-512a rather than a preliminary hearing proceeding under K.S.A. 1996 Supp. 44-534a. Therefore, the Appeals Board has jurisdiction and authority to review the April 3, 1997, Order under K.S.A. 1996 Supp. 44-551(b)(1), which reads, in part:

All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

The facts are not in dispute. On September 26, 1995, Administrative Law Judge Shannon S. Krysl ordered the payment of temporary total disability benefits commencing August 1, 1995, and continuing until claimant was released to substantial and gainful employment. In October 1995 claimant mailed and filed a Demand for Compensation due under that Order.

In October 1995 claimant's doctor released her to return to work. Claimant worked until January 1996 when her doctor again took her off work. Claimant then requested the recommencement of temporary total disability benefits and the insurance carrier complied.

In January 1997 claimant filed a Motion for Penalties alleging late payment of temporary total disability benefits for the period between December 10, 1996, and January 13, 1997. On January 30, 1997, Administrative Law Judge Frobish conducted a hearing on claimant's penalties request and assessed a \$300 penalty against respondent. One of the issues before Administrative Law Judge Frobish at the hearing was whether the September 26, 1995, Order was still binding on the parties in light of its wording and in light of claimant's return to work in October 1995. At the January 1997 hearing, respondent's counsel argued the Order was no longer binding and the insurance carrier was making voluntary payments. The Order assessing penalties against respondent was not appealed.

The present review is the result of claimant's second Motion for Penalties filed in March 1997 alleging late payment of temporary total disability benefits for the period February 4, 1997, through February 17, 1997. Administrative Law Judge Frobish conducted a hearing on claimant's second motion on April 3, 1997. At that hearing, the parties stipulated the insurance check for the temporary total benefits in question was mailed and received on February 28, 1997, and March 3, 1997, respectively. The parties also stipulated the benefits in question became due on February 17, 1997. After the hearing, Administrative Law Judge Frobish entered an order dated April 3, 1997, assessing a \$200 penalty against the respondent. It is that Order which the respondent and its insurance carrier have appealed and which is the subject of this review.

Simply stated, the issue before the Appeals Board is whether claimant is entitled to penalties from the respondent and its insurance carrier for late payment of benefits. The penalties statute, K.S.A. 44-512a(b), provides in pertinent part, as follows:

After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand.

The Appeals Board finds penalties may not be assessed under these facts. The Appeals Board agrees with respondent that the September 26, 1995, Order was no longer in effect and hence no longer binding upon the parties as it only required payment of temporary total disability benefits until such time as claimant was released to substantial and gainful employment which occurred in October 1995. Without a viable order, penalties cannot be assessed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated April 3, 1997, entered by Administrative Law Judge Jon L. Frobish should be, and hereby is, reversed and set aside.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority's analysis and would affirm Administrative Law Judge Frobish's Order.

Although we, too, question whether the September 1995 Order is binding upon the parties, that issue was not raised before Administrative Law Judge Frobish at the April 1997 hearing. However, that issue was presented to Judge Frobish at the first penalties hearing and the Judge ruled against respondent. That adverse ruling was not appealed.

A close review of the hearing transcript indicates the only issue before the Administrative Law Judge at the second penalties hearing was whether respondent and its insurance carrier had 20 days after the benefits had become due to make payment without incurring penalties. Administrative Law Judge Frobish correctly decided that issue and in the April 3, 1997, Order wrote:

The Court cannot find support within the statute for the Respondent's argument that they are entitled to twenty (20) days after payment is due when written demand had previously been made. "Subsequent failure to pay compensation...shall entitle the employee to apply for civil penalty with demand." K.S.A. 44-512a(b).

Claimant's counsel appropriately noted in his brief to the Appeals Board that respondent was raising issues before the Board on this review which were not raised at the April 1997 hearing. Claimant's counsel correctly notes this Board has repeatedly held that issues not raised before the administrative law judge should not be raised for the first time on review to this Board. See K.S.A. 44-555c which restricts the Board's review to those questions of law and fact which are presented to the administrative law judge.

Because the majority has elected to decide this review based upon issues not presented to the administrative law judge, it has violated precedent, violated K.S.A. 44-555c, and denied claimant due process of law.

BOARD MEMBER

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Scott J. Mann, Hutchinson, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director